STATE OF MAINE

YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: RE-09-111

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,

Defendants

**ORDER**

Approximately twenty-six owners of lots fronting Goose Rocks Beach in the Town of Kennebunkport have brought this action seeking a declaration that they hold fee title to the low-water mark and a judgment quieting that title. They do not dispute any interests in the beach established by deed in the York County Registry. The named defendants are the Town of Kennebunkport and "all persons who are unascertained, not in being, unknown or out of the State, heirs or legal representative of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in Plaintiffs' Property other than persons claiming ownership or easement by, through, or under an instrument recorded in the York County Registry of Deeds."

A variety of motions relating to service, intervention, joinder, and various counterclaims and defenses are before the court.

**1. Notice and Service**

The plaintiffs filed their complaint on October 26, 2009, and on November 17, 2009 filed notice that they would provide the unascertained defendants with notice by publication in the Journal Tribune, a newspaper published in York County. An advertisement titled "Notice to Persons Who Are Unascertained and to the General Public Pursuant to 14 M.R.S. § 6653" was published among the paper's legal notices on November 20, 2009, November 27, 2009, and December 4, 2009. The plaintiffs did not request the court's permission to serve process by publication or obtain an order authorizing the action as Rule 4 requires. The defendant Town of Kennebunkport objects to the plaintiffs' action on the grounds that they failed to personally serve ascertainable potential claimants and failed to follow the appropriate procedure to permit notice by publication.

"Service of process serves the dual purposes of giving adequate notice of the pendency of an action, and providing the court with personal jurisdiction over the party properly served. . . . 'Any judgment by a court lacking personal jurisdiction over a party is void.'" *Gaeth v. Deacon*, 2009 ME 9, ¶ 20, 964 A.2d 621, 626 (quoting *Brown v. Thaler*, 2005 ME 75, P 10, 880 A.2d 1113, 1116). At hearing, the parties agreed through counsel to collaboratively effect personal service on the sixty-five owners of property on Goose Rocks Beach who are not currently named in this litigation. These are necessary parties subject to personal service of process who must be joined pursuant to Rule 19 if feasible. *See Eaton v. Town of Wells*, 2000 ME 176, ¶ 47, 760 A.2d 232, 248.

The parties also agreed to work collaboratively to provide notice to "unascertained" parties, by means of Rule 4(g) or other equally effective procedures. The court approves of these actions and will reserve ruling on the Town's objection to notice while they are underway. The parties will work together to create a new

scheduling order, and discovery shall proceed among those already named in this litigation.

**2. The State of Maine's Motion to Intervene**

The State seeks to intervene as a defendant pursuant to Rule 24, citing the public interest in maintaining access to Maine's beaches and its past involvement in the cases of *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (*"Bell II"*), *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986) (*"Bell I"*); *Opinion of the Justices*, 437 A.2d 597 (Me. 1981), and more recently *Flaherty v. Muther*, Cumb. Cty. Super. Ct. No. RE-08-098 (July 30, 2009) (Crowley, J.). In *Bell v. Town of Wells*, the Law Court recognized "that the Attorney General, as the chief law officer of the State, has the power and duty to institute, conduct and maintain such actions and proceedings as he deems necessary for the protection of public rights and to defend against any action that might invidiously interfere with the same." *Bell I*, 510 A.2d at 519 (quoting *In re Estate of Thompson*, 414 A.2d 881, 890 (Me. 1980)) (quotations omitted).

Like *Bell*, the resolution of this case "will affect the rights of the public at [this] beach and may through the persuasive authority of that decision affect public rights at other Maine beaches." *Id.* This broad public interest in Maine's coast is distinct from the Town's particular interest in Goose Rocks Beach, and cannot adequately be defended by unascertained members of the public at large. The State's motion to intervene is granted. As both the State and the Town will be representing the public's interest in the beach, the court declines the Town's suggestion to appoint a guardian ad litem to represent unascertained parties at this time.

**3. The TMF Interveners; Richard & Mary Steiger's Motion to Intervene; Christopher & Janice Tyrrell's Motion to Intervene; Robert & Leslie Sullivan's Motion to Intervene; and Defendant Mark Smith's Motion to Substitute Counsel**

The so-called TMF interveners are some 171 parties being represented by the law firm of Taylor, McCormack, & Frame, LLC. The original group consisted of 167 parties, but has grown to include Robert and Leslie Sullivan, Richard and Mary Steiger, Christopher and Janice Christo Tyrrell, and Mark W. Smith.[1] Also, three additional parties submitted responsive filings after the deadline to respond or intervene. These are Roger C. and Nancy H. Allen; Kendall and Linda Burford; and David Green and Jean French. Their answers and counterclaims are essentially identical to those of the TMF interveners, and they will be treated in kind.

All of the TMF parties appear to have some connection to the Goose Rocks Beach area of Kennebunkport, Maine, but none claim any deeded title to the beach itself. Instead, their proposed counterclaims assert that the fee title in the beach resides in the Town of Kennebunkport, and in the alternative that they the beach-going public have obtained easement rights under various theories. They seek to intervene as defendants and counterclaimants pursuant to Rule 24, asserting that they are the "unascertained persons . . . who claim the right to use or title in Plaintiffs' Property" and that while their interests overlap with the Town's, they are not currently being adequately represented.

The plaintiffs oppose the TMF interveners' motion on the grounds that they lack standing to assert a claim and have not met the requirements of Rule 24. The TMF interveners' alleged interest is essentially the public interest, which the plaintiffs argue is already being fully represented by the Town and the State. The plaintiffs also fear that allowing the TMF parties to intervene in the litigation would add significant

[1] Mr. Smith had been in the case as a pro se litigant, but now seeks to join the TMF group through his motion for substitution of counsel. His claims appear to overlap with those of the TMF group and his motion is granted. The plaintiffs' motion to strike his responsive documents is moot and denied. The Sullivans', Steigers', and Tyrrells' motions to intervene are identical to that of the original TMF group and they will be treated together.

complication and delay without any commensurate benefit to either the current parties or the interveners. The plaintiffs note that they would not object to granting the TMF interveners *amicus curiae* status, nor would they object to a group of interveners able to assert personal, rather than public, claims.

The TMF interveners have not cited any statutory right to participate in this litigation, so they may only enter the case if they satisfy Rule 24(a)(2) or receive permission under Rule 24(b). Rule 24(a)(2) requires the interveners to demonstrate an interest in the subject property, a likelihood that the resolution of this case will impair their ability to protect their interest, and that their interest is not already being adequately represented. Rule 24(b) allows the court to permit intervention if the would-be interveners show that they have a claim or defense that shares a common question of law or fact with the main action, and that their intervention will not unduly delay or prejudice the rights of the existing parties. These rules presuppose that the intervener has standing to bring an independent claim.

"Standing of a party to maintain a legal action is a 'threshold issue'" and a prerequisite to judicial relief. *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984). While the concept of standing may be somewhat amorphous, it generally requires that a party have an interest in a controversy "that is 'in fact distinct from the interest of the public at large.'" *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735, 740 (quoting *Ricci*, 485 A.2d at 647); *see Nichols v. Town of Rockland*, 324 A.2d 295, 296 (Me. 1974) (standing is an amorphous concept relating to presence of a justiciable controversy capable of specific, conclusive relief). The 171 TMF interveners have not attempted to assert any individualized interests in the beach area subject to this litigation. Rather, they claim that the Town owns the beach or alternatively that they have collectively acquired a public easement. These claims merely assert the public

interest in the beach, which is already being adequately represented by the Town of Kennebunkport and the State of Maine. *See Bell I*, 510 A.2d at 518 n.18, 519 (Town may assert rights of public to beach, and the Attorney General has the power and duty to protect public rights). The TMF interveners' pleadings fall short of showing the particularized injury or claim required to obtain standing.

The court grants the law firm of Taylor, McCormack, & Frame, LLC, permission to participate in discovery *de bene esse*. However, before any of the firm's clients is granted intervener status, that intervener must provide a factual basis showing an individualized claim and must satisfy the requirements of Rule 24. *See e.g. Bell v. Town of Wells*, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sept. 14, 1987 (Brodrick, J.) (allowing participation by group of forty parties claiming private and personal easements by prescription based on their unique personal history of use).

Roger C. and Nancy H. Allen; Kendall and Linda Burford; and David Green and Jean French do not appear to have joined the TMF parties or sought representation from Taylor, McCormack, & Frame, LLC. Like the TMF interveners, however, they have failed to show any individualized interest in the beach necessary to acquire standing. The plaintiffs' motion to strike or dismiss these pleadings is granted.

**4. Agnes McNamee and John and Sonia Dalton's Motions to Withdraw**

Agnes McNamee and John V. and Sonia M. Dalton request to withdraw their filings. Both Ms. McNamee and Mr. and Mrs. Dalton appear to have joined the TMF interveners since filing their original answers, defenses, and counterclaims. As their original pleadings do not assert any individualized claims and are identical in substance to the claims of the TMF group, the requests are granted. The plaintiffs' motion to strike their pleadings is thus moot and denied.

**5. Plaintiffs' Motion to Dismiss the Defendant Town of Kennebunkport's Counterclaim Counts VI (Custom) and IX (Offset Taxes) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 9 (Custom), 12 (Abandonment), and 16 (Property Taxes), and a portion of the Town's prayer for relief pursuant to Rule 12(f); and Request for Rule 11 Sanctions**

Among the Town's counterclaims are its Count VI asserting that the Town or the public has acquired rights in the plaintiffs' property through the doctrine of custom, and its Count IX requesting that the court assess the plaintiffs for back-taxes in the event they are adjudged to hold title to the beach. The plaintiffs argue that the doctrine of easement by custom does not exist in Maine, and that the Superior Court has no authority to assess and impose property taxes. The plaintiffs object to the Town's affirmative defenses numbered 9 and 16 insofar as they rest on the same theories of custom and tax, respectively. The plaintiffs also object to the Town's affirmative defense number 12 on the grounds that the law of abandonment does not apply to fee ownership. Regarding the Town's requested relief, the plaintiffs contend that the Town has not properly pleaded the elements required for an action to quiet title and should thus receive no relief pursuant to 14 M.R.S. § 6651, and that the Town has likewise failed to establish any basis to request attorney's fees. Finally, the plaintiffs request that the Town be compelled to pay the legal fees and costs incurred in opposing its Count IX.

"A motion to dismiss tests the legal sufficiency of the complaint." *Heber v. Lucerne-in-Maine Village Corp.*, 2000 ME 137, ¶ 7, 755 A.2d 1064, 1066 (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994)). The Court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *McAfee*, 637 A.2d at 465). "For purposes of a 12(b)(6) motion, the material allegations of the complaint must be taken as admitted." *McAfee*, 637 A.2d at 465.

"Dismissal is warranted when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that [s]he might prove in support of [her] claim." *Johanson v. Dunnington*, 2001 ME 169, ¶ 5, 785 A.2d 1244, 1245–46.

Where Rule 12(b) tests the sufficiency of the complaint, Rule 12(f) provides "the means for testing the legal sufficiency of a defense." 1 Field, McKusick & Wroth, *Maine Civil Practice* 255 (2d ed. 1970). Under Rule 12(f) "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." M.R. Civ. P. 12(f).

The Town of Kennebunkport has asserted that it holds an easement by custom in Count VI of its complaint and as part of its affirmative defense number 9. The plaintiffs contend that the doctrine does not exist in Maine. Old English common law allowed the public to obtain an easement over private property where the public usage occurred "so long as the memory of man runneth not to the contrary" without interruption; was reasonable, "peaceable and free from dispute;" occurred within a bounded area; the custom was obligatory; and it was not "repugnant to other customs or law." *Eaton v. Town of Wells*, YORSC-RE-97-203 at 13–14 (Me. Super. Ct., Yor. Cty., Oct. 25, 1999) (Kravchuk, C.J.) (quoting *State ex. Re. Thornton v. Hay*, 462 P.2d 677 (Ore. 1969)). A right by custom,

> unlike a prescriptive right, never was assumed to arise from a grant by the land owner of an easement in it, but to have come, if at all, from some governmental act of a public nature, the best evidence of which had perished, or of which there never had been, as in the case of a charter from some feudal lord or ecclesiastical corporation, a public record. "Custom" was an invention to surmount the incapacity of a fluctuating body, as the inhabitants of a manor or barony, to take by grant.

*Piper v. Voorhees*, 130 Me. 305, 311, 155. A. 556, 559 (1931).

In *Bell v. Town of Wells*, the trial court accepted that the Town could establish a public easement over the plaintiff beach-owners' land, but found that the Town had

failed to meet its burden of proof. *Bell II*, 557 A.2d at 179. On appeal, the Law Court affirmed the judgment but explicitly reserved the question of whether the doctrine is part of Maine's common law. *Id.* The Court noted that "[v]ery few American states recognize the English doctrine of public easements by local custom," and that there was "a serious question whether application of the local custom doctrine to conditions prevailing in Maine near the end of the 20th century is necessarily consistent with the desired stability and certainty of real estate titles." *Id.*

Both the Town and the plaintiffs cite *Bell* to support their positions on the doctrine of custom. The Town claims that *Bell* implicitly supports the doctrine's existence, while the plaintiffs argue that *Bell* implicitly bars the doctrine's application. In fact, the state of the law is ambiguous because the Law Court has neither adopted nor rejected the doctrine. *Id.*; *Piper*, 130 Me. at 311, 155. A. at 559. This court similarly declines to rule on the doctrine's viability at this early stage of the proceedings. The plaintiffs' motion to dismiss Count VI and strike defense 9 is denied, without prejudice to reconsideration as the facts are developed.

The Town's Count IX alleges that the plaintiffs have never paid taxes on the land in question, suggests this is a sign of their intent to abandon the property, and requests that the court order the plaintiffs to pay back taxes if they are found to hold title in the beach. The Town's affirmative defense 12 raises the issue of abandonment, and defense 16 states that the plaintiffs "have failed to pay property taxes on all or any portion of Goose Rocks Beach." The plaintiffs attack these claims and defenses as legally deficient and seek attorney's fees in connection with the tax question.

First, the plaintiffs correctly argue that the theory of abandonment is not relevant to this litigation. An easement may be extinguished through abandonment if a party shows "a history of nonuse coupled with an act or omission evincing a clear intent to

abandon" the right of way. *Canadian N. Ry. v. Sprague*, 609 A.2d 1175, 1179 (Me. 1992). However, "'a perfect legal title cannot be lost by abandonment.'" *Town of Sedgwick v. Butler*, 1998 ME 280, ¶ 6, 722 A.2d 357, 358 (quoting *Picken v. Richardson*, 146 Me. 29, 36, 77 A.2d 191, 194 (1950)). The plaintiffs in this case claim to have perfect title in the disputed beach and have not advanced any theory of easement. If they do in fact hold the fee interest, they could not abandon it. *Picken*, 146 Me. at 36, 77 A.2d at 194. The Town's affirmative defense number 12 is thus stricken as irrelevant, and Count IX dismissed insofar as it relates to abandonment.

Second, the plaintiffs are also correct that the question of property taxes is not properly before the court. To begin, the Town concedes that it has never assessed the plaintiffs or their predecessors in title for property taxes on the beach. The assessment and collection of property taxes is entrusted to the State Tax Assessor and the respective municipalities by statute. 36 M.R.S. §§ 501–65; 701–66. The legislature has similarly prescribed statutory processes for tax collection. 36 M.R.S. §§ 751–66, 891–1084. Even if the Town had assessed the plaintiffs on their beach property and the plaintiffs were delinquent, this in itself would have no bearing on their title to the property. The procedure for imposing and foreclosing a tax lien is codified in sections 552 and 941 through 948. The court rejects the Town's attempt to analogize unassessed taxes to damages and cannot impose extra-statutory taxation in the guise of damages. Affirmative defense 16 is stricken and Count IX dismissed in its entirety. The plaintiffs' request that Rule 11 sanctions be imposed on the Town for its taxation argument is denied.

Finally, the plaintiffs' motion to strike portions of the Town's requested relief is denied.

In summary, the plaintiffs' motion to dismiss Count VI (custom); to strike defense 9 (custom) and the requests for relief pursuant to 14 M.R.S. § 6651 and for attorney's fees; and the plaintiffs' request for Rule 11 sanctions is denied. The plaintiffs' motion to dismiss Count IX (property taxes) and to strike defenses 12 (abandonment) and 16 (property taxes) is granted.

**6. Plaintiffs' Motion to Dismiss the Defendants Alexander M. and Judith A. Lachiatto's Counterclaim Counts III (Acquiescence), V (Dedication and Acceptance), VI (Custom), VII (Easement), and VIII (Implied/Quasi Easement) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 2 (Standing), 7 (Public Trust), 9 (Custom), 15 (Consideration), and 16 (Property Taxes), and a portion of the Lachiattos' prayer for relief pursuant to Rule 12(f)**

Defendants Alexander M. and Judith A. Lachiatto are interveners who own a back-lot property near Goose Rocks Beach in Kennebunkport, Maine. They have agreed to withdraw Counts III, V, and VI of their counterclaim, affirmative defenses 2, 15, and 16, and their request for relief pursuant to 14 M.R.S. § 6651. They maintain, however, Counts VII for easement and VIII for implied easement, their defenses asserting the public trust doctrine and easement by custom, and their right to seek attorney's fees later in the proceedings.

The doctrine of easement by custom was addressed above. The Lachiattos' defense number 9 is identical to the Town's, and the plaintiffs' motion to strike it is denied. The same is true of their request for attorney's fees and costs. The Lachiattos' Count VII merely recites the theories of easement by prescription, implication, and the public trust doctrine, which are already raised by their Counts IV, VIII, and defense 7 respectively. Count VII is thus dismissed as being duplicative or unduly repetitive.

Count VIII asserts that an easement for local residents and/or the public was created through implication by a prior quasi-easement. An easement can be created in this way if:

> (1) the property when in single ownership [was] openly used in a manner constituting a "quasi-easement," as existing conditions on the retained land that are apparent and observable and the retention of which would clearly benefit the land conveyed; (2) the common grantor, who severed unity of title, . . . manifested an intent that the quasi-easement should continue as a true easement, to burden the retained land and to benefit the conveyed land; and (3) the owners of the conveyed land . . . continued to use what had been a quasi-easement as a true easement.

*Northland Realty, LLC v. Crawford*, 2008 ME 92, ¶ 13, 953 A.2d 359, 364 (quoting *Robinson v. Me. Cent. R.R. Co.*, 623 A.2d 626, 627 (Me. 1993)) (alterations and omissions in original). The same test can be applied to determine if an easement burdening the conveyed land was created. *Connolly v. Me. Cent. R.R. Co.*, 2009 ME 43, ¶ 8 n.1, 969 A.2d 919, 922 n.1.

The Lachiattos allege that the "[p]laintiffs' predecessors in title are the common grantors of lots in the vicinity of Goose Rocks Beach and Goose Rocks Beach itself," and that "[t]he circumstances at the time of conveyance of the lots located adjacent to, and in the vicinity of, Goose Rocks Beach imply the intent of the [p]laintiffs' predecessors in title to subject . . . Goose Rocks Beach" to an easement favoring the Town, the public, or the defendants." Under Maine's rules of notice pleading, the Lachiattos have broadly alleged circumstances that, developed through discovery, could show that a common grantor marketed and conveyed the plaintiffs' properties in a way that created a quasi-easement in the Lachiattos' favor. The plaintiffs' motion to dismiss Count VIII is denied.

The Lachiattos' affirmative defense number 7 asserts that the public trust doctrine bars the plaintiffs' claims to the extent that the doctrine includes the public right to use the beach for general recreational purposes. The issues raised by this case clearly implicate the public trust doctrine, and the court will not bar discussion of the doctrine at this early phase of litigation. The plaintiffs' motion to strike affirmative defense 7 is denied.

To summarize, the Lachiattos have withdrawn Counts III (acquiescence), V (dedication and acceptance), and VI (custom), affirmative defenses 2 (standing), 15 (consideration), and 16 (property taxes), and their request for relief pursuant to the quiet title statute. The plaintiffs' motion to dismiss Count VIII (implied easement) and strike defense 9 (custom), defense 7 (public trust), and the request for attorney's fees is denied. The motion to dismiss Count VII (easement) is granted.

**7. Plaintiffs' Motion to Dismiss Defendants Richard J. and Margarete K.M. Driver's Counterclaim Count I (Fee Simple) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 2 (Standing), 7 (Public Trust), 9 (Custom), 15 (Consideration), and 16 (Property Taxes), and a portion of the Drivers' prayer for relief pursuant to Rule 12(f)**

Defendants Richard J. and Margarete K.M. Driver are interveners who own back-lot property in the Goose Rocks Beach area of Kennebunkport, Maine. Count I of their counterclaim asserts that the "[f]ee simple title to Goose Rocks Beach has resided in Defendants Town of Kennebunkport, and/or the public, continuously for over 100 years" and seeks a declaration affirming the Town's ownership. The plaintiffs correctly argue that the Drivers do not have standing to assert the Town's interest.

As discussed above, a party may only litigate personal interests that are distinct from the interest of the public at large. *Ricci*, 485 A.2d at 647. In Count I of their counterclaim, the Drivers attempt to litigate the interests of the Town of Kennebunkport and the general public. While they do allege that the "[d]efendants, and/or the public, have acquired fee simple title . . . by prescription," the referenced "defendants" appear to be the "Defendants Town of Kennebunkport, and/or the public." The Drivers themselves interpret their complaint this way and explain that "Count I is plead to encompass our rights as members of the general public." The Town is already a party to this litigation and will adequately represent its interest. Both the Town and the State

will represent the public at large. The Drivers, as individuals, may not separately litigate these broad civic interests and their Count I is dismissed.

The plaintiffs also seek to strike a number of the Drivers' affirmative defenses. "An affirmative defense is one 'raising new facts or arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.'" *Estate of Cilley v. Lane*, 2009 ME 133, ¶ 13, 985 A.2d 481, 486 (quoting Black's Law Dictionary 430 (7th ed. 1999)). The Drivers have agreed to withdraw defense 15. Defense number 2 asserts that the plaintiffs lack title to the beach and therefore lack standing to assert their claims. This is a denial of the plaintiffs' claims rather than an affirmative defense because its merit rests on disproving the allegations in the plaintiffs' complaint. It effectively duplicates the Drivers' answer, and the plaintiffs' motion to strike it is granted.

The Drivers' affirmative defense number 7 is identical to the Lachiattos' defense number 7 and contends that the plaintiffs' claims are barred to the extent the public trust doctrine reserves a public right to use the beach for general recreation. The plaintiffs' motion to strike defense 7 is denied.

Affirmative defenses 9 and 16 concern the doctrine of custom and property taxes, respectively. These issues have already been discussed. The motion to strike is denied on defense 9, but granted on defense 16. Finally, the motion to strike the request for attorney's fees is denied.

In summary, the Drivers' have withdrawn defense 15 (consideration). The motion to strike defense 7 (public trust), defense 9 (custom), and the Drivers' request for attorney's fees is denied. The motion to dismiss Count I (fee simple) and strike defenses 2 (standing) and 16 (property taxes) is granted.

**8. Plaintiffs' Motion to Dismiss Defendants Sharon Ann Eon-Harris and John Michie Harris's Counts III (Acquiescence), V (Dedication and Acceptance), VI (Custom), VII (Easement), VIII (Implied Easement), X (Harassment), XI (Interference with Economic Advantage), and XII (Loss of Property Value) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 2 (Standing), 7 (Public Trust), 9 (Custom), 15 (Consideration) and 16 (Property Taxes), and a Portion of the Harrises' prayer for relief pursuant to Rule 12(f); and Request for Rule 11 Sanctions**

Defendants Sharon Ann Eon-Harris and John Michie Harris are interveners who own back-lot property in the Goose Rocks Beach area. Count III of their counterclaim asserts an interest in the beach through the plaintiffs' acquiescence. Title can be obtained through acquiescence if a party can show by clear and convincing evidence:

> (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice of the possession to the adjoining landowner; (3) conduct by the adjoining landowner from which recognition and acquiescence, not induced by fraud or mistake, may be fairly inferred; and (4) acquiescence for a long period of years, such that the policy behind the doctrine of acquiescence—that a boundary consented to and accepted by the parties for a long period of years should become permanent—is well served by recognizing the boundary.

*Hamlin v. Niedner*, 2008 ME 130, ¶ 7, 955 A.2d 251, 254. The plaintiffs object that while the Harrises have pleaded the general elements of acquiescence, they have not alleged any specific facts entitling them to their requested relief.

Each claim in a pleading must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." M.R. Civ. P. 8(a). "Where a Maine Rule of Civil Procedure is identical to the comparable federal rule, '[the courts] value constructions and comments on the federal rule *as aids* in construing our parallel provision.'" *Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676, 680 (quoting *Me. Cent. R.R. Co. v. Bangor & Aroostook R.R. Co.*, 395 A.2d 1107, 1114 (Me. 1978)) (emphasis added in *Bean*). Rule 8(a) is "practically identical to the comparable federal rule[]." *Id.*

Pleadings do not need to allege specific facts to survive a 12(b)(6) motion to dismiss unless required to do so by Rule 9(b). However, the United States Supreme

Court recently instructed that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (citations omitted).

The Harrises' counterclaim recites the elements of a claim of title by acquiescence, but does not allege any facts to satisfy those elements. At minimum, they have failed to indicate what visible line delineates the area they have possessed or by what conduct the plaintiffs indicated their acquiescence to the Harrises' occupation. Without this information the plaintiffs do not have notice of the Harrises' grounds for recovery and are hampered in their ability to prepare a defense. *See Twombly*, 550 U.S. at 555. The Harrises' Count III is dismissed.

Count V of the Harrises' counterclaim asserts that the plaintiffs have dedicated their beach property to the public and that the dedication has been accepted. Dedication and acceptance is one way for the public at large to acquire an easement or right of way over private property. *Manchester v. Augusta Country Club*, 477 A.2d 1124, 1128–29 (Me. 1984). "To prove dedication, two conditions must be shown: that the land in question was 'dedicated' by the grantor for a public purpose; and that the public 'accepted' the dedication by some affirmative act." *Id.* at 1129. While the Town of Kennebunkport or the State of Maine clearly have standing to raise this claim as the public's representative, it is far less clear that the Harrises are similarly situated. They are private citizens who lack standing to litigate claims on behalf of the general public. As such, Count V is dismissed.

The Harrises' Counts VI for custom, VII for easement, and VIII for implied easement are identical to those claims brought by the Town and the Lachiattos. These

are addressed above. The motion to dismiss Counts VI and VIII is denied, but the motion to dismiss Count VII is granted. Counts X through XII are unique to the Harrises. Count X asserts a claim for harassment stemming from an incident in which one or more of the plaintiffs allegedly reported the Harrises to the police for trespassing over the beach area. The plaintiffs correctly point out that there is no general common law cause of action for harassment in Maine. The Harrises have not pleaded any facts showing entitlement to protection or recovery under Maine's Protection from Harassment statute, and in any event such actions must be brought in District Court. 5 M.R.S. §§ 4651–52. Count X is dismissed.

Count XI alleges that the plaintiffs have tortiously interfered with an economic advantage. The apparent basis for this is the harassment identified in Count X, which has allegedly damaged the Harrises' relationship with their tenants and decreased the value of their rental property. "Tortious interference with a prospective economic advantage requires a plaintiff to prove: (1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages." *Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d 1104, 1110. The Harrises' have not sufficiently pleaded fraud, so their case must rest on intimidation.

"Interference by intimidation involves unlawful coercion or extortion. . . . [A] person who claims to have, or threatens to lawfully protect, a property right that the person believes exists cannot be said to have intended to deceive or to have unlawfully coerced or extorted another simply because that right is later proven invalid." *Id.* at ¶ 16, 798 A.2d at 1111. Read generously, the Harrises' complaint alleges that the plaintiffs contacted the police and wrongfully accused the Harrises or their tenants of trespassing. The Harrises do not allege that the plaintiffs did so in bad faith, only that it

was wrongful. If the allegations are true they still fall short of showing the fraud or intimidation necessary to support a claim of tortious interference and the Harrises' Count XI is dismissed.

The Harrises Count XII asserts a claim for the loss of property value allegedly resulting from the plaintiffs' actions. While lost value may be an element of damages, there is no independent tort claim for diminished property value caused by another's lawful assertion of a property right. Count XII is dismissed. The plaintiffs' request for Rule 11 attorney's fees and costs in relation to Counts XI and XII is denied.

The plaintiffs' motion to strike affirmative defenses 2 (standing), 7 (public trust), 9 (custom), and 16 (property taxes), has been discussed above and the same considerations apply to the Harrises as to the other defendants. The motion to strike is denied on defenses 7 and 9, but granted on defenses 2 and 16. The same is true of their requests for relief pursuant to the quiet title statute and for attorney's fees and costs, and the motion to strike these requests is denied. Affirmative defense number 15 asserts that the plaintiffs' claims are barred by lack of consideration. The only relevance this theory could have to this litigation would be to show that the plaintiffs do not actually hold title to the contested beach, and therefore it is not an affirmative defense. *Estate of Cilley*, 2009 ME 133, ¶ 13, 985 A.2d at 486 (affirmative defense defeats claim even if plaintiffs' allegations are true). The plaintiffs' motion to strike defense 15 is granted.

To summarize, the court denies the motion to dismiss Count VI (custom) and Count VIII (implied easement); denies the motion to strike defense 7 (public trust), defense 9 (custom), and the Harrises' requested relief; and denies the plaintiffs' request for Rule 11 sanctions. The court grants the motion to dismiss the Harrises' Counts III (acquiescence), V (dedication and acceptance), VII (easement), X (harassment), XI

(tortious interference), and XII (loss of property value); and grants the motion to strike defenses 2 (standing), 15 (consideration), and 16 (property taxes).

**The entries are:**

- The court retains the Town of Kennebunkport's objection to notice and service under advisement.
- The State of Maine's motion to intervene is granted.
- The TMF interveners' motion to intervene is denied. Their attorneys, Taylor, McCormack, & Frame, LLC, are granted standing to participate in discovery *de bene esse*. Individual interveners may request to join this litigation pursuant to Rule 24 if they can show a factual basis for an individualized claim.
- The plaintiffs' motion to strike the responsive documents of Roger C. and Nancy H. Allen; Kendall and Linda Burford; and David Green and Jean French is granted.
- Mark W. Smith's motion to substitute counsel is granted.
- Agnes McNamee and John and Sonia Dalton's motions to withdraw their individual court filings are granted.
- The plaintiffs' motion to strike the responsive documents of Mark W. Smith; Agnes McNamee; and John and Sonia Dalton is denied.
- The plaintiffs' motion to dismiss the defendant Town of Kennebunkport's Counterclaim Count IX and to strike affirmative defenses 12 and 16 is granted. The motion is otherwise denied.
- Defendants Alexander M. and Judith A. Lachiatto voluntarily withdraw their Counterclaim Counts III, V, and VI; and their affirmative defenses 2, 15, and 16; and their request for relief pursuant to the quiet title statute. The plaintiffs' motion to dismiss their Counterclaim Count VII is granted, and the motion is

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otherwise denied.

- Defendants Richard J. and Margarete K.M. Driver voluntarily withdraw their affirmative defense 15. The plaintiffs' motion to dismiss their Counterclaim Count I and to strike their defenses 2 and 16 is granted. The motion is otherwise denied.
- The plaintiffs' motion to dismiss defendants Sharon Ann Eon-Harris and John Michie Harris's Counterclaim Counts III, V, VII, X, XI, and XII; and to strike their affirmative defenses 2, 15, and 16 is granted. The motion is otherwise denied.

DATE: 8/17/10

G. Arthur Brennan
Justice, Superior Court